

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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EMPIRE FIRE AND MARINE
INSURANCE COMPANY, a
corporation duly organized
under the laws of the State of
Oklahoma, with principal place
of business in State of
Nebraska,

Plaintiff,

v.

MARK BROOM III, an individual;
KAREN BROOM, an individual;
Does 1 through 50,

Defendants.

NO. CIV. S 05-0716 MCE DAD

MEMORANDUM AND ORDER

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Presently before the Court is a Motion to Dismiss,
predicated on lack of subject matter jurisdiction under Federal

1 Rule of Civil Procedure 12(b)(1)¹, filed by Defendant Karen Broom
2 ("Karen"). Karen contends the instant declaratory action, filed
3 by Plaintiff Empire Fire and Marine Insurance Company ("Empire"),
4 must be dismissed because the state court is the proper forum for
5 resolution of all the issues. Alternatively, Karen contends that
6 this action should be stayed. For the reasons set forth below,
7 Karen's motion is DENIED.²

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9 **BACKGROUND**

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11 Defendant Mark Broom, III ("Mark") rented a vehicle from
12 Enterprise Rent A Car ("Enterprise"). In conjunction with the
13 rental, Mark purchased insurance coverage under a Supplemental
14 Liability Insurance policy ("policy") provided by Empire. When
15 driving the vehicle, Mark was involved in a single vehicle
16 accident in which Karen suffered injuries. Karen brought a
17 personal injury action against Mark and Enterprise in Sacramento
18 County Superior Court.

19 Empire's policy exempts "injury to or property damage
20 suffered by the renter, any authorized driver or employee of the
21 renter, or family members of the aforementioned related by blood,
22 marriage or adoption if such family member resides in the same
23 household with the renter...". Pl.'s Compl. ¶ 8. Empire seeks a
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25 ¹ Unless otherwise stated, all further references to a Rule
26 are to the Federal Rules of Civil Procedure.

27 ² Because oral argument would not be of material
28 assistance, this matter was deemed suitable for decision without
oral argument. E.D. Local Rule 78-230(h).

judicial declaration that, regardless of the outcome in the state court action, Mark is not entitled to indemnity for injuries to Karen under its policy.

STANDARD

On a motion to dismiss pursuant to Rule 12(b)(1), the standard the court applies varies according to the nature of the jurisdictional challenge. A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of jurisdiction contained in the complaint as insufficient on their face to demonstrate the existence of jurisdiction ("facial attack"), or may be made as a "speaking motion" attacking the existence of subject matter jurisdiction in fact ("factual attack"). Thornhill Publishing Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). If the motion constitutes a facial attack, the court must consider the factual allegations of the complaint to be true. Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir. 1981); Mortensen, 549 F.2d at 891. If the motion constitutes a factual attack, however, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Thornhill, 594 F.2d at 733 (quoting Mortensen, 549 F.2d at 891).

ANALYSIS

"In a case of actual controversy within its jurisdiction, ... any court of the United States may ... may declare the rights and legal obligations of any interested party seeking such declaration." 28 U.S.C. § 2201 (West 1994). When a party challenges the court's subject matter jurisdiction over a declaratory action, the district court determines whether the lawsuit presents a case or controversy and whether exercising the court's discretionary jurisdiction is appropriate. The court must make a sufficient record of its reasoning to enable appellate review. Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1222-23, 1225 (9th Cir. 1998) ("GEICO").

1. Case or Controversy Requirement

An action by an insurer to determine its liability to defend or indemnify an insured satisfies the case or controversy requirement. GEICO, 133 F.3d at fn. 2; Am. Nat'l Fire Ins. v. Hungerford, 53 F.3d 1012, 1015-16 (9th Cir. 1995); Am. States Ins. Co. v. Kearns, 15 F.3d 142, 144 (9th Cir. 1994).

2. Exercise of Court's Discretion**a. Presumption to Decline Jurisdiction**

The pendency of a state action does not require a district

1 court to decline jurisdiction over a declaratory action, however,
2 where there are "parallel state proceedings involving the same
3 issues and parties pending at the time the federal declaratory
4 action is filed, there is a presumption that the entire suit
5 should be heard in state court." GEICO, 133 F.3d at 1225 (citing
6 Chamberlain v. Allstate Ins. Co., 931 F.2d 1361 (9th Cir. 1991)).

7 Karen argues that because the pending state court action is
8 parallel to this action, there is a presumption that the state
9 court should hear the entire matter. In Huth v. Hartford, 298
10 F.3d 800 (9th Cir. 2002), a case relied upon in the moving
11 papers, the Ninth Circuit upheld the dismissal of a declaratory
12 action when there was a declaratory action pending in the state
13 court and the state court action involved identical parties and
14 precisely the same issue. Id. at 802.

15 This action and the state court action do not represent
16 parallel actions with identical parties and issues. Here, the
17 state court action is a personal injury suit for damages between
18 Mark and Karen, while Empire seeks a declaration of its
19 obligations under the insurance contract. The issue of liability
20 under tort law is not identical to the issue of an obligation
21 under a contract. Further, Empire is not a party to the state
22 court action, nor can it join the action under California law.
23 The California Evidence Code prohibits the admission of evidence
24 of liability insurance. Cal. Evid. § 1155 (West 1995).
25 Moreover, the California Supreme Court has construed § 1155 to
26 prohibit an action against both the insured and the insurer.
27 Moradi-Shalal v. Fireman's Fund. Ins. Co., 46 Cal. 3d 287, 311
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(1988); Royal Globe Ins. Co. v. Superior Ct., 23 Cal. 3d 880, 891 (1979).

Because there is no parallel state court action with issues identical to those raised in this proceeding, this Court finds no grounds to presume that the entire matter should be heard in state court. Thus, the decision to exercise jurisdiction in this case is solely within the Court's sound discretion.

b. Brillhart Factors

In determining whether to exercise its discretion, the court must consider whether the declaratory action 1) will create duplicative litigation, 2) will encourage filing declaratory actions as a means of forum shopping, or 3) will require a needless determination of state law. GEICO, 133 F.3d at 1220 (quoting Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942)). These considerations, commonly referred to as the Brillhart factors, will now be addressed in turn.

1. Avoiding Duplicative Litigation. Retaining jurisdiction over this matter will not encourage duplicative litigation. Empire is well within its rights to bring an action to declare its obligations under the insurance contract. Further, as set forth above, Empire cannot pursue its interests within the pending state court action under California law. Resolving the tort liability issues and the insurance contract obligations requires two separate actions. As a diverse party, Empire chose

1 to bring its action in this federal court as it was entitled to
2 under 28 United States Code section 1332 (West 1993 & Supp.
3 2005).

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5 **2. Avoiding Forum Shopping.** The court must also determine
6 whether the exercise of jurisdiction will encourage forum
7 shopping, or "reactive" declaratory actions. A federal court
8 should not entertain a "reactive" or "defensive" declaratory
9 action brought by an insurance company. Continental Cas. Co. v.
10 Robsac Indus., 947 F.2d 1367, 1371 (9th Cir. 1991). When the
11 insurer is a party to the state court action, filing a
12 declaratory action to determine an identical issue in federal
13 court is "reactive." Id. at 1372-73. In the present case,
14 Empire is not a party to the state court action, and, as set
15 forth above, cannot join the action. Further, the tort liability
16 issues presented in the state court action and the contractual
17 obligation issues presented in this federal action are not
18 identical. Because this federal action is not "defensive" or
19 "reactive," exercising jurisdiction over this matter does not
20 encourage forum shopping.

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22 **3. Avoiding a Needless Determination of State Law.** A
23 federal declaratory action involves a needless determination of
24 state law where the pending state court action will resolve the
25 issue. Id. at 1371. Where the state and federal proceedings
26 will resolve the same issue, the state court is the preferable
27 forum. Huth, 298 F.3d at 804. In the present case, as already
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1 indicated, the state court proceeding will resolve issues of
2 liability under tort law, while this declaratory action will
3 resolve contractual obligations. Because the pending state court
4 action will not resolve the issues presented in this declaratory
5 action, this case does not present a "needless" determination of
6 state law.

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8 **CONCLUSION**
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10 Based on the foregoing, Defendant Karen Broom's Motion to
11 Dismiss is hereby DENIED.

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13 IT IS SO ORDERED.

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15 DATED: November 16, 2005

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19 MORRISON C. ENGLAND, JR.
20 UNITED STATES DISTRICT JUDGE
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